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No. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1990

CHARLES W. BUTLER,

Petitioner,

v.

RICHARD THORNBURGH, et al.,
As Attorney General of the United States,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Where Congress has expressly provided that section 501 of the Rehabilitation Act applies to each employee of the executive branch, may a court properly read that statute to exclude all law enforcement officers?

2. May a federal civilian employee of the executive branch who is an alcoholic be discharged from his employment consistently with section 501 of the Rehabilitation Act if he has not first been granted a "firm choice" between rehabilitation or discipline?

3. Where the internal regulations of the Federal Bureau of Investigation provide that the agency "will" accord certain protections to an Agent who is an alcoholic, may a court decline to enforce those regulations against the FBI on the ground they are merely "precatory"?

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v.

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As Attorney General of the United States,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Charles W. Butler, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States court of Appeals for the Fifth Circuit entered in this proceeding on May 15, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (Appendix A) is reported at 900 F.2d 871 (5th Cir. 1990). The decision of the district court (Appendix B) is unreported.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 15, 1990. This Court on July 19, 1990 having extended until September 12, 1990 the time in which this Petition may be filed, jurisdiction is hereby invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 501(b) of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791(b), provides in pertinent part:

> Each department, agency, and instrumentality . . . in the executive branch shall . . . submit to the Office of Personnel Management and to the Committee an affirmative action program plan for the hiring, placement, and advancement of individuals with handicaps in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met. . . .

Section 701 of the regulations of the Equal Employment Opportunity Commission, 29 C.F.R. § 1613.701, provides in pertinent part:

> (b) *Applicability.* (1) This subpart applies to executive agencies as defined in section 105 of Title 5 of the United States Code and to those positions in the legislative and judicial branches of the Federal Government and the government of the District of Columbia which are in the competitive service. . . .

Section 702 of the regulations of the Equal Employment Opportunity Commission, 29 C.F.R. § 1613.702, provides in pertinent part:

> (f) "Qualified handicapped person" means with respect to employment, a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who, depending upon the type of appointing authority being used: (1) Meets the experience and/or education require-

> ments (which may include passing a written test) of the position in question, or (2) meets the criteria for appointment under one of the special appointing authorities for handicapped persons.

Section 704 of the regulations of the Equal Employment Opportunity Commission, 29 C.F.R. § 1613.704, provides in pertinent part:

> (a) An agency shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

STATEMENT OF THE CASE

Petitioner was a Special Agent of the Federal Bureau of Investigation from 1973 until his termination in 1987. During that period, petitioner became an alcoholic, and he was involved in alcoholism-related incidents in 1978, 1983, and February 1987. During none of these incidents was anyone threatened or harmed, and at no time during any of these incidents did petitioner display or brandish his weapon. (In the February 1987 incident, petitioner misplaced his FBI-assigned vehicle; the car was recovered two days later. *See Butler v. Thornburgh*, 900 F.2d at 872; App. at 2a.) After the 1978 and 1983 incidents, the FBI disciplined petitioner and warned him against a recurrence.

The FBI has promulgated internal regulations for handling employees, including Special Agents, with alcohol-related illnesses. These regulations provide that the FBI will afford alcoholic employees "the same consideration and offer of assistance that are presently extended to employees having other illnesses." App. at 1c. As part of this self-imposed obligation, the FBI regulations require that it give to its alcoholic employees the opportunity to obtain treatment for their illness; if that offer is refused, the FBI is to provide the employee a "firm choice . . . between accepting assistance through counseling . . . and cooperating in the treatment prescribed, or accepting the consequences provided for unsatisfactory performance". App. at 2c.

At no time prior to the February 1987 incident did the FBI give petitioner any offer of counseling or rehabilitation. After the February 1987 incident, petitioner voluntarily and on his own initiative entered an in-patient rehabilitation facility, and he has abstained from drinking ever since.

In June 1987, however, the FBI notified petitioner that his dismissal was being considered, based upon his alcohol-related incident the preceding February, and it terminated petitioner on that basis in November 1987. At the time it terminated petitioner, the FBI was aware that petitioner had attended in-patient rehabilitation, that he had remained sober, and that his prognosis was excellent. *Butler v. Thornburgh*, 900 F.2d at 872; App. at 2a.

Petitioner filed suit in United States District Court for the Eastern District of Louisiana, in New Orleans, on July 7, 1988. Petitioner stated a claim under the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794a, in which he asserted that regulations promulgated by the Equal Employment Opportunity Commission implementing the Rehabilitation Act require federal agencies to grant their employees a "firm choice" between discipline and in-patient rehabilitation before they can be terminated for alcohol-related performance or conduct. *See, e.g., Rodgers v. Lehman*, 869 F.2d 253 (4th Cir. 1989). Petitioner also stated a claim under the Administrative Procedures Act, on the ground the FBI dismissed him in violation of its own regulations, which also require that the agency offer its alcoholic employees rehabilitation or a "firm choice" prior to dismissal.[1]

The FBI responded by arguing that FBI agents suffering from alcoholism are not protected by the Rehabilitation Act because the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970 ("the Hughes Act"), which pertains to alcoholic use by federal employees, specifically exempts agents of the FBI and other national security agencies from its coverage. 42 U.S.C. § 290dd-1. *See* note 12, *infra*.

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[1] In addition, petitioner asserted that the FBI had violated his right to minimal due process under the Fifth Amendment by terminating him without a hearing. Petitioner is not pursuing that claim before this Court.

Judge Schwartz granted the respondent's motions for summary disposition of the case. He held that (a) the Hughes Act effectively excludes petitioner from the protection of the Rehabilitation Act; and (b) the FBI's internal regulations governing the treatment of alcoholic agents were not mandatory and, in any event, their violation constituted harmless error.

The Fifth Circuit did not confront the question whether the Hughes Act exempts FBI agents suffering from alcoholism from the protections of the Rehabilitation Act, the ostensible basis of the district court's opinion, "leav[ing] that argument for another day." *Butler v. Thornburgh*, 900 F.2d at 875; App. at 7a.[2] Rather, the Fifth Circuit concluded,

> whether or not Butler comes within the scope of the protections of the Rehabilitation Act, his position as a law enforcement officer means that *his alcoholic incidents furnish a sufficient basis for his discharge* because he cannot carry on his work safely.

Id. at 876 (emphasis added); App. at 8a.

Thus, rather than deciding the validity of the legal issue adjudicated by the district court, the Fifth Circuit effectively amended the Rehabilitation Act to exempt from its protection all law enforcement officers in the executive branch. Moreover, the court accomplished this amendment without ever affording petitioner a hearing on the factual question whether, with his alcoholism properly treated, he could safely perform his duties.

In addition, the Fifth Circuit did not address petitioner's claim under the Administrative Procedures Act that the FBI violated its own regulations by dismissing him without affording him the "firm choice." The court held that the regulations were precatory,[3] and that

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[2] Nor did the court of appeals confront the question whether respondent complied with the Administrative Procedures Act.

[3] As an example of the precatory nature of the regulations, the Fifth Circuit cited the following:

> *Should* the employee refuse assistance in the face of deteriorating or unsatisfactory performance, employee *should* be given a firm choice between accepting assistance . . . or accepting the consequences provided for unsatisfactory performance.

Butler v. Thornburgh, 900 F.2d at 877 n.4 (emphasis supplied by the court); App. at 10a.

in any event petitioner was not harmed because the regulations mandate job protection only for "self-referrals" and petitioner was not a "self-referral".[4]

REASONS FOR GRANTING THE WRIT

1. The court of appeals' holding that petitioner is not protected by section 501 of the Rehabilitation Act because he is a law enforcement officer has improperly nullified Congress' decision that all executive branch employees are included within the scope of the Act

The Fifth Circuit held that petitioner was not protected by section 501 of the Rehabilitation Act because, as a law enforcement officer expected to carry a weapon, he could not be both qualified to perform his duties and an alcoholic. Congress, however, has elected not to exclude from coverage any category of executive branch employee, including law enforcement officers. Accordingly, the court impermissibly has amended the Act, thereby effectively eliminating from its protection almost 35,000 employees.

Congress enacted the Rehabilitation Act of 1973 in order, *inter alia*, to "promote and expand employment opportunities in the public and private sectors for individuals and to place such individuals in employment". 29 U.S.C. § 701(8) (1988 Supp.). Congress intended that the federal government would "fulfill[] its leadership responsibilities in this area",[5] and be the "model employer" of the handicapped. 29 C.F.R. § 1613.703 (1988). Accordingly, while in the case of the private sector Congress directed only that employers not discriminate against handicapped individuals, 29 U.S.C. § 794(a), in their capacity as employer federal agencies are obligated to affirmatively assist their handicapped employees to make them productive, *id.* § 791(b).

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[4] The finding that petitioner was not a "self-referral" is factually incorrect: petitioner had referred himself for in-patient rehabilitation nine months before he was dismissed. *Butler v. Thornburgh*, 900 F.2d at 872-73; App. at 10a.

[5] 124 Cong.Rec. 30347 (1978) (Remarks of Senator Cranston), *quoted in Shirey v. Devine*, 670 F.2d 1188, 1199 (D.C. Cir. 1982).

It is now clear that alcoholism is considered a handicapping condition under the Rehabilitation Act of 1973. *See Butler v. Thornburgh*, 900 F.2d at 874 (and cases cited); App. at 6a. The Vocational Rehabilitation Act, 29 U.S.C. § 41(b) (1970), had included alcoholics and drug abusers in the definition of handicapped individuals; Congress' refusal to expressly exclude alcoholics from the definition of "handicapped individual" in the Rehabilitation Act of 1973 has persuaded the Attorney General that alcohol abuse constitutes a handicapping condition under section 501 of the Rehabilitation Act, 29 U.S.C. § 791 (1988). 43 Op.Atty.Gen. No. 12 (1977).[6]

As discussed in more detail at pp. 9-11, *infra*, it is settled that section 501 of the Rehabilitation Act obligates the executive branch to offer an alcoholic civilian employee a "firm choice" between rehabilitation and discipline before dismissing him from his employment for conduct related to his condition. The Fifth Circuit held that petitioner was not entitled to the protections of the Rehabilitation Act, however, including the firm choice requirement, because he was not a "qualified handicapped individual" within section 702(f) of the EEOC's implementing regulations. 900 F.2d at 875-76; App. at 8a.[7] According to the Fifth Circuit, petitioner's "position as a law enforcement officer means that his alcoholic incidents furnish a basis for his discharge because he cannot carry on his work safely". *Id.* at 876; App. at 8a, citing *Copeland v. Philadelphia Police Department*, 840 F.2d 1139, 1140 (3d Cir. 1988), *cert. denied*, 109 S.Ct. 1636 (1989) (retaining a police officer who used illegal drugs would constitute a

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[6] Significantly, in 1978 Congress amended the definition of "handicapped individual", 29 U.S.C. § 706(7)(B) (1978), to exclude alcoholics and drug abusers from the protections of sections 503 and 504 of the Rehabilitation Act, 29 U.S.C. §185 793, 794. That Congress specifically did not extend this exclusion to section 501 of the Act, 29 U.S.C. § 791, which applies exclusively to federal employees, is a clear indication that alcohol abuse is still considered a handicapping condition under that section. *See Crewe v. United States Office of Personnel Management*, 834 F.2d 140, 142 (8th Cir. 1987).

[7] As quoted above at p.2, a "qualified handicapped individual" is one who,

> with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others . . . .

29 C.F.R. § 1613.702(f) (1988).

substantial modification of the essential functions of the department and cast doubt upon the integrity of the police force).[8]

If the analysis of the court below is permitted to stand, it will result in the automatic exclusion from the protection of the Rehabilitation Act of every federal law enforcement or security officer who is permitted to carry a weapon.[9] Congress, however, applied section 501 of the Act to "each department, agency, and instrumentality . . . in the executive branch". 29 U.S.C. § 791(b). *See also* 29 C.F.R. § 1613.701(b) (EEOC regulations implementing Rehabilitation Act apply to "executive agencies as defined in section 105 of Title 5 of the United States Code").[10] The decision whether to include law enforcement personnel within the Rehabilitation Act is obviously one the Congress is free to make; there is no indication in the Act or its legislative history that Congress ever intended to exclude such employees from the scope of section 501. Absent some evidence of Congressional intent, which it did not cite, the court of appeals simply was not permitted to amend the statute by judicial fiat in this manner. *See North Dakota v. United States*, 460 U.S. 300, 312 (1983) ("in determining the scope of a statute, one is to look first at its language"), quoting *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 110 (1983).[11]

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[8] Because the use of alcohol is not illegal in the United States, the court of appeals' reliance upon *Copeland* is inapposite.

[9] As of 1974, the latest date for which figures are immediately available, the executive branch employed 32,700 law enforcement officers, of whom 8,600 were FBI Agents. *See* S.Rep. 93-948, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 3698, 3701. The FBI currently employs about 9,800 Agents. Wall Street Journal, Aug. 31, 1990, Sec. A, at 12, column 1.

[10] 5 U.S.C. § 105 defines "executive agency" to include the Executive Departments; the Department of Justice, of which the FBI is a part, is an Executive Department. 5 U.S.C. § 101.

[11] The court of appeals rested its finding that petitioner's status as an alcoholic rendered him unqualifed to be a law enforcement officer on the ground he could not be trusted with his weapon in his condition. The FBI itself, however, has declined to make the sweeping decision to disqualify all alcoholic Agents. On the contrary, to the extent a particular Agent's carrying his weapon is inconsistent with his recovery, the FBI's own regulations governing its alcoholic employees provide for "changing the [Agent's] assignment within the office . . . and/or relieving the Agent of [his] sidearm". FBI MAOP Sec. 15-3.2.1(4); App. at 3c. Because the FBI does not

2. The decision of the court of appeals that petitioner could be dismissed without first being offered a firm choice between in-patient treatment and discipline is in conflict with the interpretations of the Rehabilitation Act by the other courts of appeals and by the agencies responsible for its implementation

The Fifth Circuit affirmed the dismissal of petitioner for alcohol-related misconduct even though he had never been offered a firm choice between treatment and discipline. That decision, and its rationale, conflict with the decisions of the other courts of appeals and the appropriate agencies responsible for interpreting and enforcing the Rehabilitation Act.

The history of Congressional concern for alcoholic civilian employees of the executive Branch, beginning with both the Vocational Rehabilitation Act, 29 U.S.C. § 41(b) (1970), and the Hughes Act,[12] is set forth at p. 7, *supra*. In each case, Congress manifest its determination that alcoholic federal employees be given the opportunity for rehabilitation as a means of recovery.

Particularly in light of the Hughes Act, it is also clear that alcoholic employees are to be given an opportunity for rehabilitation before they are disciplined for conduct related to their condition. During enactment of the Hughes Act, the Senate indicated its intent that "the alcoholic employee, like any other employee suffering from a disease, will now be provided with an opportunity for treatment instead of being summarily discharged", and that an employee who has accepted treatment will be dismissed only when "treatment has repeatedly failed, and he is clearly not capable of meeting the demands of the job."[13]

The Office of Personnel Management was assigned the responsibility for developing rules implementing the Hughes Act. 42 U.S.C. §

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automatically reject an alcoholic Agent merely because he carries a weapon, there is absolutely no basis for the court's final and decisive finding that petitioner was unqualified for employment with the agency.

[12] Pub.L. 91-616, 84 Stat. 1849, originally codified at 42 U.S.C. §§ 4541, 4561 (1970). In 1983, portions of the Hughes Act were recodified at 42 U.S.C. § 290dd. *See* Pub.L. 98-24, 97 Stat. 181.

[13] S.Rep. No. 91-1069, 91st Cong., 2d Sess. 20 (1970).

4561(a) (1970).[14] Accordingly, OPM promulgated rules in the Federal Personnel Manual requiring that a federal employee whose use of alcohol interferes with the safe performance of his duties will be granted "non-disciplinary procedures under which [the] employee with a drinking . . . problem is offered rehabilitative assistance", and that the employee can only be disciplined "failing response which results in acceptable work performance."[15]

The Merit Systems Protection Board was established by Congress to adjudicate appeals by federal employees who have been dismissed by their agencies and who allege that their dismissal was the result, *inter alia*, of handicap discrimination. 5 U.S.C. § 7702. The Board has interpreted the Rehabilitation Act as precluding the termination of an alcoholic federal employee until he has been given "another chance to come to terms with his problem and its effect on work performance." *Ruzek v. General Services Administration,* 7 M.S.P.R. 437, 444-45 (1981).

Until the decision below, every Circuit to have considered the question has agreed that section 501 of the Rehabilitation Act imposes upon federal agencies the obligation to affirmatively accommodate the handicapping conditions of their alcoholic employees by offering them a "firm choice" between rehabilitation and discipline before they can be terminated for alcohol-related conduct or performance. *See Whitlock v. Donovan*, 598 F.Supp. 126 (D.D.C. 1984), *aff'd*, 790 F.2d 964 (D.C. Cir. 1986); *Crewe v. United States Office of Personnel Management*, 834 F.2d 140 (8th Cir. 1987); *Rodgers v. Lehman*, 869 F.2d 253 (4th Cir. 1989). The requirement is most forcefully articulated in *Rodgers v. Lehman*:

* * *

> 2. If the employee's unsatisfactory job performance continues, the agency must provide the employee with a "firm choice" between treatment and discipline. The agency must clearly and unequivocally warn the employee that

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[14] At the time, the Office of Personnel Management's responsibility for promulgating rules and regulations governing federal employment rested with the predecessor Civil Service Commission. In 1986, Congress amended the Hughes Act to strike out subsection (a). Pub.L. 99-570, § 6002(b)(1), 100 Stat. 3207-158, 3207-159.

[15] Federal Personnel Manual Supp. 792-2, subch. S1-2(a) (February 29, 1980).

> unsatisfactory job performance caused by drinking will result in discipline, eventually including the termination of employment.
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> * * *
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> 4. If the employee ceases to participate in the outpatient treatment, is discharged for non-cooperation or continues to drink after completion of that treatment and is guilty of job-related misconduct, the agency must, before discharging him, afford him an opportunity to participate in an inpatient program, using accrued or unpaid leave, unless the agency can establish that it would suffer an undue hardship from the employee's absence.
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> * * *

Id. at 259.

There is no district court case to the contrary. *See McElrath v. Kemp*, 714 F.Supp. 23, 26-27 (D.D.C. 1989) (dismissal reversed for failure to afford a firm choice); *Fong v. Department of the Treasury*, 705 F.Supp. 41, 45 (D.D.C. 1989) (firm choice required unless agency has not been advised employee is an alcoholic); *Lemere v. Burnley*, 683 F.Supp. 275 (D.D.C. 1988) (firm choice satisfied where agency twice afforded opportunity for in-patient rehabilitation); *Fisher v. Walters*, 1988 U.S. Dist. LEXIS 647 (N.D.Ill. January 26, 1988) (when employee given a firm choice counseling session, requirement that agency retain him after further relapse would be an undue hardship); *Burchell v. Department of the Army*, 679 F.Supp. 1393, 1400-1401 (D.S.C. 1988) (agency violated Rehabilitation Act when it terminated alcoholic employee before giving him opportunity to overcome his condition), *aff'd sub nom Rodgers v. Lehman, supra*; *Robinson v. Devine*, 37 Emp.Prac.Dec. (CCH) ¶35,384 (D.D.C. 1985) (dismissal sustained where firm choice unsuccessful). Where the conduct in question is not criminal or otherwise egregious, no court has relieved an executive branch agency of its obligation to offer its alcoholic employees a firm choice before disciplining them.

The court of appeals questioned the validity of the "firm choice" requirement in general,[16] and declined to apply it to petitioner in

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[16] *Butler v. Thornburgh*, 900 F.2d at 874; App. at 5a.

particular because, as a law enforcement officer, he was not a "qualified handicapped individual". The court's reliance upon that reasoning constitutes a plain error of law for two fundamental reasons. First, whether petitioner is a "qualified handicapped individual", and therefore entitled to reasonable accommodation, 29 C.F.R. § 1613.704, depends upon his ability to perform the duties of his position without consideration of his handicap. *See Burchell v. Dep't of the Army, supra*, 679 F.Supp. at 1401 & n.4 (plaintiff a qualified handicapped employee under the Rehabilitation Act because "each of the alleged acts of misconduct . . . grew out of the plaintiff's alcoholism"). To find that petitioner is excluded from the Act solely because of incidents related to his condition extends the protection of the statute only to those who do not need it. Petitioner's ability safely to perform his duties as an Agent of the FBI was always considered exemplary, and was never challenged by the FBI except for the widely-spaced incidents caused by his alcoholism.

Second, the Fifth Circuit had no basis from which to conclude that petitioner could not perform his duties as an FBI Agent. That question was never raised in the district court, which thus had no occasion to "conduct an individualized inquiry and make appropriate findings of fact" concerning petitioner's qualifications,[17] and could not have been adjudicated by the court of appeals.

Accordingly, petitioner suggests that the granting of the writ is appropriate to determine whether the decision below is consistent with the decisions of the other circuits, which interpret the Rehabilitation Act as reflecting Congress' decision to require a firm choice before an alcoholic federal employee may be disciplined for conduct or performance caused by his condition.

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[17] *School Board of Nassau County, Fla. v. Arline*, 480 U.S. 273, 287 (1987) (requiring such an inquiry when determining whether an individual is "otherwise qualified" under section 504 of the Rehabilitation Act).

3. The FBI's regulations governing the treatment of alcoholic Agents, which repeatedly provide that the FBI "will" take certain actions with respect to such Agents, are mandatory and may be enforced through an action under the Administrative Procedures Act

Even if, as the Fifth Circuit held, petitioner was not entitled to a firm choice under the Rehabilitation Act and the EEOC's regulations, petitioner stated a claim under the Administrative Procedures Act for enforcement of the FBI's own regulations entitling him to a firm choice before dismissal. The decision below refusing to enforce these regulations on the ground the regulations are merely precatory is clearly inconsistent with the decisions of this Court.

It is now settled that federal courts have the authority under the APA to review a claim by a federal employee that his agency has failed to follow its own regulations when it dismissed him. *See Sampson v. Murray*, 415 U.S. 61, 71 (1974) ("federal courts do have authority to review the claim of a discharged governmental employee that the agency effectuating the discharge has not followed administrative regulations"); *Service v. Dulles*, 354 U.S. 363, 388 (1957) (federal courts have power to review an agency's actions to ensure that it has followed its own regulations); *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959) (agency obligated to comply with its own internal procedures even if they are more rigorous than required by law). Indeed, the United States has conceded that an agency's "failure to follow its *own regulations* can be challenged under the APA". *Webster v. Doe*, 108 S.Ct. 2047, 2053 n.8 (1988) (emphasis in original).

The FBI's regulations at issue clearly protect alcoholic Agents such as petitioner from dismissal for conduct related to their condition until they have been offered effective treatment and that treatment has failed. Paragraph 15-3.1 provides that an employee who, as petitioner, "has accepted treatment *will be* dismissed *only* when he has been granted sick leave, *treatment has failed*, and he is clearly not capable of meeting the demands of the job." App. at 1c. Paragraph 15-3.1 further states that alcoholic Agents "*will be* afforded the same consideration and offer of assistance that are presently extended to employees having other illnesses". App. at 1c (emphasis added). The FBI's regulations provide job security for those who, like petitioner,

refer themselves for treatment, ¶15-3.3(4); App. at 3c, and further provide that an Agent who refuses an offer of assistance, "should be given a firm choice", ¶15-3.2.1(3); App. at 2c.

The Fifth Circuit erroneously found these regulations unenforceable because, *inter alia*, they are precatory, citing the use of the term "should" rather than "shall" in certain provisions. *Butler v. Thornburgh*, 900 F.2d at 877 & n.4; App. at 10a. Whether an agency pronouncement is enforceable against it is, however, determined through reference to its intent and not to the presence of a particular word. *See Fiorentino v. United States*, 607 F.2d 963, 968 (Ct.Cl. 1979), cert. denied, 444 U.S. 1093 (1980).[18] Manuals, handbooks, and rules will not bind the Government "[i]f they go counter to governing statutes and regulations of the highest or higher dignity". *Id.*[19]

The FBI regulations at issue do no more than restate the Rehabilitation Act as it applies to every other executive branch employee, and there is no basis upon which to deny their enforcement against the FBI. Moreover, the regulations are not purely suggestive; rather, they contain sufficient directions that the agency "will" comply with certain procedures to support the conclusion the FBI intended them to be binding upon agency supervisors. *Cf. Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983) (use of language of "unmistakably mandatory character" indicates state intended regulations to be binding).

If these regulations were not intended to bind the FBI, there is no reason why they were issued. On the contrary, these regulations were intended by the FBI to comply with a limit which the agency believed had already been placed upon its discretion to dismiss an alcoholic Agent. The Fifth Circuit's failure to apply the FBI's regulations against the agency constitutes a departure from established law sufficient to warrant review by this Court.

---

[18] While declining to enforce the FBI's regulations against the FBI because it uses the word "should", the court of appeals disregarded that reasoning and adopted the district court's application of the regulation against petitioner. *See* 900 F.2d at 877; App. at 10a: "However, FBI policy requires that employees *should* never cause themselves to be mentally or physically unfit for duty" (emphasis added), quoting Paragraph 15-3.3(2)

[19] The FBI's personnel handbooks have already been held binding upon the FBI. *See Ashton v. Civiletti*, 613 F.2d 923 (D.C. Cir. 1979).

CONCLUSION

Petitioner respectfully requests that his petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHARLES W. BUTLER,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 89-3337
	)	
RICHARD THORNBURGH, *et al.*,	)	
	)	
Appellees.	)	
	)	

May 15, 1990

Before GEE, GARZA, and DAVIS, Circuit Judges.

GEE, Circuit Judge:

This appeal comes to us from the district court's denial of relief to an FBI agent who was discharged from his employment with the Bureau because of incidents connected with a drinking problem. Appellant Butler invokes the Rehabilitation Act of 1973, 29 U.S.C. Sections 701-794, and the operating procedures of the FBI in his challenge to the decision of the district court. For the reasons set out below, we must hold that Mr. Butler's claims fail and we, therefore, affirm the decision of the district court.

Statement of the Facts

Appellant Charles W. Butler was an employee of the Federal Bureau of Investigation from 1970 until he was dismissed in November 1987. Butler was appointed a Special Agent of the FBI in 1973, and he served in that capacity for 14 years. As a special agent, Butler was required to conduct surveillances, undertake investigations, testify in federal court, make arrests, collect evidence, conduct counter-intelligence activities, carry and use a firearm, use physical force and drive an automobile.

Butler is an alcoholic, although his problem did not affect his employment until he had been a Special Agent for five years. In May 1978, Butler picked a fight with a crippled gas station attendant in Washington, D.C., while under the influence of alcohol. Later, a similar incident occurred, in which Butler physically injured a security guard in a fight that he provoked. While on probation as a result of that incident, Butler sought and obtained treatment for his condition, remaining incident-free until 1983. In that year, while under the influence of alcohol, he drove a Bureau vehicle into a wall in Louisiana, wrecking both it and the wall. Reprimanded, again placed on probation, and warned that any future incident could and would result in his discharge, Butler again sought treatment.

Butler's condition caused no further trouble until February 1987, when he again became intoxicated and forgot where he had left his Bureau vehicle. (It was recovered a few days later.) For the first time he voluntarily checked himself into an inpatient alcohol rehabilitation facility. When he had completed this program, the FBI was notified that Butler's "prognosis will be excellent for recovery and prolonged abstinence." Butler has abstained from drinking since the February 1987 incident.

In June 1987, the FBI notified Butler that his dismissal was being considered because of the repeated alcohol-related incidents. Butler responded by requesting reconsideration because of his favorable prognosis and abstinence. In November 1987, however, the FBI dismissed him.

Butler exhausted his administrative remedies and filed suit in federal district court, alleging that his firing had violated his rights under the Rehabilitation Act of 1973, under the Fifth Amendment's guarantee of due process, and under the FBI's own regulations. The district court dismissed Butler's claim under the Rehabilitation Act and granted summary judgment for the FBI on his constitutional and regulatory claims. Butler appeals from the disposition of the district court as to the Rehabilitation Act and the regulatory claims.

The central question raised in his appeal is whether the Rehabilitation Act of 1973, as amended, 29 U.S.C. Sections 701-794 (hereinafter the Rehabilitation Act), reaches out to protect an alcoholic FBI agent from discharge. Resolution of this question depends on parsing

the complex statutory and regulatory framework that governs the rights and duties of federal employers toward their employees. Of particular intricacy in this case is the interplay between the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (the Hughes Act) and the Rehabilitation Act.

The Hughes Act

The Hughes Act provides in pertinent part as follows:

> (b) Prior alcohol abuse no bar to federal employment; exceptions
>
> (1) No person may be denied or deprived of Federal Civilian employment or a Federal professional or other license or right solely on the ground of *prior* alcohol abuse or *prior* alcoholism.
>
> (2) *This subsection shall not apply to employment*
>
> (A) *in the* Central Intelligence Agency, *the Federal Bureau of Investigation*, the National Security Agency, or any other department or agency of the Federal Government designated for purposes of national security by the President. . . .

42 U.S.C. § 290dd-1(b) (emphasis added).

A considerable wrangle emerges in the briefs over the weight to be attached to the word "prior" as used in the statutory formula. For Butler, "prior" assumes totemistic value. As a tool of statutory construction, Butler looks to the ordinary meaning of the word and concludes, not surprisingly, that "prior" cannot include his alcohol abuse because such was current at the time of his termination. Thus, Butler contends, the Hughes Act has no application to him, given the fact that it addresses only discrimination arising out of prior alcohol abuse, the fact that he makes no claim under it and, therefore, the statutory exemption for the F.B.I. is irrelevant.

The government responds by arguing that, notwithstanding "prior", the true intent of the Congress was to cover *current* abuse of alcohol. According to the House Report, No. 91-1663, adopted by both houses to accompany the Hughes Act,

> The legislation gives a clear mandate to the Civil Service Commission to develop policies and services for the prevention and treatment of alcohol abuse and alcoholism among Federal civilian employees which are consistent with the purposes and intent of the Act. *The alcoholic employee*, like any other employee suffering from a disease, *will now be provided with an opportunity for treatment instead of being summarily discharged. The committee has, however, provided reasonable exceptions in the case of certain sensitive agencies or positions within agencies.*

1970 U.S.Code Cong. & Admin.News 5719, 5727-5728 (emphasis added).

This language leads to the dismaying conclusion that, indeed, Congress did not say what it meant or mean what it said in its use of "prior" in the text of the Section. Be that as it may, however, it is quite clear that Congress never intended the Hughes Act to protect *all* current alcohol abusers. In Section 290dd-1(c) we find the unequivocal statement that "[t]his section shall not be construed to prohibit the dismissal from employment of a Federal civilian employee who cannot properly function in his employment." We may safely conclude, therefore, that the Hughes Act embraces both prior alcohol abusers, and current alcohol abusers who are functional in their jobs, but not current dysfunctional abusers. Clearly the recurring incidents that precipitated Charles Butler's termination reveal him to have been a current dysfunctional alcoholic at the time of his firing. Consequently, the Hughes Act ordains no protection for the kind of problem that Mr. Butler exhibited. Because Mr. Butler could not be included in the definitional sweep of the Act, we have no need to resort to the "sensitive agencies" exception to drop him from its protection. If we did so, however, we could scarcely avoid concluding that current alcoholism is *a fortiori* of prior alcoholism and therefore that the sensitive agency exception covers both.

We fully recognize the fact that our adopting the government's reasoning on this point does not affect the outcome that, under either view of the Hughes Act — Mr. Butler's or the government's — it affords no protection to Mr. Butler. Nor does it necessarily follow

that, because Mr. Butler finds no solace in the Hughes Act, his claim under the Rehabilitation Act must also fail. The parties' quarrel over how we should view the Hughes Act is really a shadow play on the real issue before us, i.e. the scope of protection afforded Mr. Butler under the Rehabilitation Act. Butler urges us to construe the Rehabilitation Act as a higher state in the evolution of federal protection for alcoholic employees, surpassing the initial bare bones attempt of the Hughes Act.[1] The government, on the other hand, maintains that the Hughes Act trenches on any broad interpretation we might make of the Rehabilitation Act and that Congress, in enacting the Rehabilitation Act, saw itself as amplifying and not as extending the Hughes Act.

We turn now to consideration of the Rehabilitation Act.

The Rehabilitation Act

The Rehabilitation Act of 1973, 29 U.S.C. Sections 701-794, prohibits the federal government from engaging in employment discrimination against handicapped persons. 29 U.S.C. § 791(b). The Act also forbids discrimination by federal contractors (Section 793) and federal grantees (Section 794). Alcoholism is arguably a handicapping condition for purposes of the handicap discrimination provisions of the Act. The Attorney General has so concluded, 43

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[1] We note in passing that at least one court has divined a "firm choice" requirement on the part of the federal government from the statutory history of the Hughes Act. In construing Section 290dd-1(c), which provides that "[t]his section shall not be construed to prohibit the dismissal from employment of a Federal civilian employee who cannot properly function in his employment", a court has held that "the legislative history indicates that dismissal was intended to apply only to employees who refused treatment altogether or who had repeatedly failed in treatment." *Whitlock v. Donovan*, 598 F.Supp. 126 at 131 (D.D.C. 1984), *aff'd without opinion*, 790 F.2d 964 (1986). We find it necessary to point out, however, that the legislative history that the *Whitlock* court expressly relied upon derives from the Senate version of the bill and from its related report. 598 F.Supp. at 131, n. 8. The final House version of the bill, however, expressly deleted any reference to an alcoholic employee's failure to accept appropriate treatment. 116 Cong.Rec. at 42539. It was the House version that was promulgated into law. (The Senate bill was passed in lieu of the House bill after substituting for its language the text of the House bill). 1970 U.S.Code Cong. & Admin. News 5719. We respectfully raise the possibility, without so holding, that the federal courts in the District of Columbia have misapprehended the law and incorrectly read a firm choice provision into the Hughes Act for alcoholic employees.

Op.Atty.Gen. No. 12 (1977), as has the federal agency charged with carrying out the Act. *See* opinion of the Merit Systems Protection Board in *Ruzek v. General Services Administration*, 7 MSPB 307, 7 M.S.P.R. 437 (1981). Some federal courts have held likewise. *Whitlock v. Donovan*, 598 F.Supp. 126, 129 (D.D.C.1984), *aff'd without opinion*, 790 F.2d 964 (1986); *Crewe v. United States Office of Personnel Management*, 834 F.2d 140, 141 (8th Cir.1987). The broadranging language of Section 791(b), upon which we will chiefly focus today, imposes on federal agencies a duty toward handicapped individuals (employees and applicants).[2] Section 794 declares a policy of non-discrimination toward "otherwise qualified" handicapped individuals on the part of the federal government or federal grantees.[3]

Assuming, as we do for purposes os this appeal, that alcoholism is within the scope of the Act's provisions regarding "handicapped" employees, simply commences our inquiry today. Much confusion has bedeviled judicial interpretation of the Rehabilitation Act. Here, as with the Hughes Act, courts have had to grapple with nebulous statutory history and to cuff carelessly drafted matter into shape. For Mr. Butler's dispute with the FBI, the problems stem from the 1978 Amendments to the Act.

In 1978, Congress embarked on an extensive program for federal employment of the handicapped. To this end, it amended Section 501 (codified as Section 8791) by Section 505(a)(1) to establish a private

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[2] Section 791(b) provides in pertinent part:

> Each department, agency, and instrumentality . . . in the executive branch shall . . . submit to the Commission . . . an affirmative action program plan for the hiring, placement, and advancement of individuals with handicaps in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met. . .

[3] Section 794 provides in pertinent part:

> No otherwise qualified individual with handicaps in the United States as defined in Section 706(8) of this title, shall, solely by reason of her of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. . .

right of action subject to the same procedural limitations as are set forth in Title VII of the Civil Rights Act in favor of claimants suing the federal government or its agencies, This private right of action resembles that already in place for claimants suing federal grantees under old Section 504 (codified as Section 794). 29 U.S.C. § 794a(a)(1). Congress also broadened the ban on handicap discrimination imposed on federal grantees by old Section 504 to cover the federal government. 29 U.S.C. § 794(a). The upshot of these amendments was that codified Sections 791 and 794 partially overlapped, affording a claimant a dual mode of action against the federal government under Section 791's preference provisions or Section 794's anti-discrimination provisions. *See Prewitt v. United States Postal Service*, 662 F.2d 292, 304 (5th Cir. 1981).

Mr. Butler chose to sue the FBI under Section 791(b), a choice foreclosed to him, according to the FBI, by another 1978 amendment to the Rehabilitation Act. That amendment excluded from the definition of "handicapped individual" current alcohol and drug abusers, specifically providing as follows:

> For purposes of Sections 793 and 794 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse,m would constitute a direct threat to property or the safety of others.

29 U.S.C. § 706(8)(B).

On the strength of *Prewitt*, the FBI trenchantly argues that, consonant with the Hughes Act's exclusion of currently dysfunctional alcoholics the exclusion for current abusers of alcohol and drugs specifically applicable to Sections 793 and 794 must be extended also to Section 791(b), thus baring Butler's claim against it. We need not place our decision upon so broad a basis, however, and we leave that argument for another day.

Section 791(b) forbids the federal government from using a person's handicap to deny him employment where the person

> with or without reasonable accommodation, *can perform the essential functions of the position in question without endangering the health and safety of the individual or others and* who, depending upon the type of appointing authority being used: (1) Meets the experience and/or education requirements (which may include passing a written test) of the position in question, or (2) meets the criteria for appointment under one of the special appointing authorities for handicapped persons.

29 C.F.R. § 1613.702(f) (emphasis ours).

The FBI, citing this provision, contends that, due to his recurrent bouts with alcohol, Butler was unable to "perform the essential functions of the position in question without endangering the health and safety of the individual or others . . . ." The FBI continues that, being an active dysfunctional alcoholic is not compatible with the safekeeping of either property or of lives, when that alcoholic is required to carry a badge and gun, drive a vehicle, all with only two hours' notice, 24 hours a day, 7 days a week. Clearly, Butler's four incidents of drunken misconduct constitute the reason for the FBI's decision to terminate him.

We find the FBI's argument here entirely persuasive. Accordingly, and whether or not Butler comes within the scope of the protections of the Rehabilitation Act, his position as a law enforcement officer means that his alcoholic incidents furnish a sufficient basis for his discharge because he cannot carry on his work safely. *See* 29 C.F.R. § 1613.702(f). Butler has not cited a single case to contradict the government's position on this. Moreover, the precedent that he relies on supports the government's view here. In *Nisperos v. Buck*, 720 F.Supp. 1424 (N.D.Cal. 1989), the court held that Nisperos (an INS general attorney) could recover under the Rehabilitation Act because a drug-free history was not an essential element of an INS lawyer's function. 720 F.Supp. at 1429. The court arrived at this conclusion by distinguishing a lawyer's job from that of a police officer. Citing *Copeland v. Philadelphia Police Dept.*, 840 F.2d 1139 (3rd Cir. 1988), *cert. denied*, 109 S.Ct. 1636 (1989), the court stated:

> In *Copeland*, the court held that accommodating within the ranks of the police department an officer who used illegal

> drugs would constitute a substantial modification of the essential functions of the department and cast doubt upon the integrity of the police force. 840 F.1d at 1140. However defendant here has not demonstrated that the position of an INS general attorney is analogous to a police officer. A police officer is on the front line of law enforcement, whereas Nisperos had not responsibilities for the investigation, apprehension, or detention of individuals suspected of criminal offenses.

720 F.Supp. at 1430-31 (footnote omitted).

Likewise, an FBI special agent stands in the front line of law enforcement; and alcohol dependence would seriously compromise his ability to function and could well pose just such a threat to the safety of others as is proscribed by regulation. 29 C.F.R. § 1613.702(f). Thus, the Rehabilitation act offers no protection to Butler because he has shown himself incapable of safely performing his duties, even the simplest of which — carrying a loaded firearm — is a demanding and dangerous one.

Our conclusion that the regulations promulgated under the Rehabilitation Act preclude recovery for Mr. Butler disposes of all but one of the remaining issues on appeal. That is Mr. Butler's claim that the FBI violated its own polices and procedures by dismissing him without first offering him a "firm choice."

The FBI's policies and procedures

Mr. Butler maintains that under the internal rules of the FBI he was entitled to an opportunity for a "firm choice" before being dismissed.

The issue here is whether the FBI regulations are mandatory or precatory. The FBI contends that the terms of its policy for alcoholics are precatory and thus without any binding legal effect. The FBI relies heavily on *Judd v. Billington*, 863 F.2d 103 (D.C. Cir. 1988), a case in which the Library of Congress disregarded its own internal regulations in discharging an alcoholic employee. Those regulations, like the FBI's regulations, had been adopted from unpublished guidelines promulgated by the Office of Personnel Management and were without legal effect because neither was published in the Federal

Registry nor codified in the Code of Federal Regulations. Further, they were entirely precatory because they described themselves as intended for "guidance"; and even the "firm choice" provision was couched in terms of "superiors should" not "shall" offer a firm choice. 863 F.2d at 106-107. the FBI "firm choice" provision is couched in precisely the same precatory language.[4] We concur fully in the reasoning of Judge Schwartz in the trial court, where he states:

> the evidence indicates the FBI's statements regarding its Alcoholism Program do not have the force with which plaintiff attempts to imbue them. The language used throughout regarding the implementation of the program is precatory.[5] However, FBI policy requires that employees should never cause themselves to be mentally or physically unfit for duty.[6] The FBI rules also provide that normal rehabilitation procedures need not be followed in situations where actions or activities are present which constitute employee misconduct.[7]

Moreover, even if the FBI policies and procedures were mandatory, they would not have afforded Butler a firm choice because he was not a "self referral" and only "self referrals" are accorded any form of job security.[8]

For the reasons set forth above we hold that Mr. Butler's case fails under the Hughes Act, under the Rehabilitation Act and its regulations, and under the FBI's own internal guidelines. Accordingly, the decision of the district court is AFFIRMED.

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[4] In its Manual of Administrative Operations and Procedures (MAOP), Part I, section 15 at subpart 3.2.1(3) the FBI states: *Should* the employee refuse assistance in the face of deteriorating or unsatisfactory performance, employee *should* be given a firm choice between accepting assistance ... or accepting the consequences provided for unsatisfactory performance ...." (emphasis ours).

[5] See Manual of Administrative Operations and Procedures (MAOP), Part I, Sec. 15 at subpart 3.2.1.

[6] See MAOP, Part I, Sec. 15 at subpart 3.3(2).

[7] See MAOP, Part I, Sec. 15 at subpart 3.3(3).

[8] FBI MAOP, Part I, §15-3.3(4).

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CHARLES W. BUTLER	CIVIL ACTION
VERSUS	NO. 88-2924
EDWIN W. MEESE, ET AL.	SECTION "A"

ORDER AND REASONS

This matter came before the Court for hearing of April 12, 1989 on motion of defendants for summary judgment. The Court is of the opinion that oral argument is not necessary. Accordingly, IT IS ORDERED that said motion be and hereby is taken under submission. After reviewing the parties' original and supplemental memoranda, the Court finds defendants' motion well founded in fact and law and hereby GRANTS the motion for the following reasons.

The Court finds that as a Special Agent of the Federal Bureau of Investigation, and an excepted service federal employee, plaintiff does not possess a property interest in his employment so as to trigger the protections of the Fifth Amendment.[1]

Regarding plaintiff's allegations that the FBI violated its own policies and procedures in terminating plaintiff's employment, the evidence indicates the FBI's statements regarding its Alcoholism Program do not have the force with which plaintiff attempts to imbue them. The language used throughout regarding the implementation of the program is precatory.[2] However, FBI policy requires that employees should never cause themselves to be mentally or physically unfit for duty.[3] The FBI rules also provide that normal rehabilitation procedures need not be followed in situations where actions or ac-

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[1] *Harrison v. Bowen*, 815 F.2d 1505, 1511 (D.C. Cir. 1987); see also 28 U.S.C. § 536.

[2] See Manual of Administrative Operations and Procedures (MAOP), Part I, Sec. 15 at subpart 3.2.1., attached as Exhibit A to plaintiff's original Memorandum in Opposition.

[3] See MAOP, Part I, Sec. 15 at subpart 3.3(2).

tivities are present which constitute employee misconduct.[4] It is undisputed that the stated reasons for plaintiff's dismissal from the FBI involved violations of both federal statutory law as well as various provisions of the FBI's own MAOP.[5]

The Court further finds that plaintiff's discharge from his employment was not due to his alcoholism, but due to his recurrent misconduct. The record shows that on at least four occasions, plaintiff engaged in serious improper conduct involving injury to both persons and property.[6] In this regard, the Court finds persuasive the discussion in *Richardson v. United States Postal Service*, 613 F.Supp. 1213 (D.C. Cir. 1985) [sic]. Therein the Court stated:

> The nexus between the crime and the alcohol is, of course, highly conjectural. But even if events of 1978 and earlier were to be examined to untangle the reasons underlying Richardson's mental difficulties and alcohol use and Richardson's alcoholism was shown to be a substantial cause of his criminal conduct, it would not benefit Richardson here. Richardson was discharged for his criminal conduct, not because of alcoholism or poor job performance due to alcohol. He does not claim otherwise. The Rehabilitation Act only protects against removal "solely because of alcohol abuse." 29 U.S.C. § 794. It does not prohibit an employer from discharging an employee for improper off-duty conduct when the reason for the discharge is the conduct itself, and not any handicap to which the conduct may be related. *See Huff v Israel*, 573 F.Supp. 107 (M.D.Ga. 1983); *Guerriero v. Schultz*, 557 F.Supp. 511 (D.D.C. 1979). The Act does not create a duty to accommodate an alcoholic who is not "otherwise qualified", *i.e.* commits an act which standing alone disqualifies him from service and is not entirely a manifestation of alcohol abuse. The criminal acts that Richardson commit-

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[4] See MAOP, Part I, Sec. 15 at subpart 3.3(3).

[5] See Letter of Edwin J. Sharp dated June 3, 1987, attached as Exhibit 4 to defendant's original Memorandum in Support.

[6] See affidavit of Charles W. Butler, attached as Exhibit 2 to defendant's original Memorandum in Support, Rec. doc. 13.

ted are disqualifying under the rules of policy of the Postal Service and he was properly discharged.[7]

Regarding plaintiff's termination, the evidence shows the correct procedures were followed.[8]

Finally, even though plaintiff's claims and actions show he has been aware for some time that he is an alcoholic, there is no evidence in the record raising the inference he was unaware of the FBI's policies and procedures regarding alcoholic employees set forth in the standard FBI Manual of Administrative Operations and Procedures, and no evidence that he could not have availed himself thereof unassisted. The record shows plaintiff was well aware that his conduct was jeopardizing his job; given such knowledge, plaintiff does not indicate how, even if he was required to be given a "firm choice", what effect such a warning would have had on his conduct.[9]

For the foregoing reasons, the defendants' motion for summary judgment dismissing plaintiff's complaint is hereby GRANTED.

New Orleans, Louisiana, this 19th day of April 1989.

\s\ Philip Schwartz, Jr.
United States District Judge

[7] See MAOP, Part I Sec. 15 at subpart 3.2.1, and Part I, Sec. 1-1(4), 1-2 and 1-3(1), attached as Exhibit A to plaintiff's Memorandum in Opposition, Rec. doc. 23. See also Letter of Edwin J. Sharp dated June 3, 1987, attached as Exhibit 4 to defendant's original Memorandum in Support, Rec. doc. 13.

APPENDIX C

FBI MANAGEMENT AND ADMINISTRATIVE OPERATIONS PROCEDURES

Section 15 (Injuries and Disabilities)

15-3 ALCOHOLISM AND ALCOHOL ABUSE – PREVENTION, TREATMENT, AND REHABILITATION

15-3.1 Policy

Because of the FBI's unique responsibilities as an intelligence organization, there can be no relaxation of the basic regulation set forth in Section 1-2 of this manual. Recognizing, however, that alcoholism is an illness and that chronic alcohol abuse can be symptomatic of other problems, employees manifesting such illness or problems will be afforded the same consideration and offer of assistance that are presently extended to employees having other illnesses. The goal of the Alcoholism Program is to assist employees with alcohol problems in rehabilitating themselves so that they might again lead lives useful to themselves, their families and the FBI. No employee's job security will be jeopardized by employee's own request for counseling or referral assistance. Sick leave will be granted for the purpose of treatment or rehabilitation as in any other illness. Employees who suspect they have an alcohol problem are encouraged to voluntarily seek medical help and counseling. An employee who has accepted treatment will be dismissed only when he/she has been granted sick leave, treatment has failed, and he/she is clearly not capable of meeting the demands of the job. The confidential nature of medical records of employees with drinking problems will be preserved in the same manner as all other medical records. Public Law 91-616 provides that "health and disability insurance plans for Federal civilian employees hereafter contracted or renegotiated will cover alcoholism in the same way as other diseases."

• • •

15-3.2.1 Implementation of the Program

An effective program must be tied to community resources concerned with the treatment of alcoholism. Employees requiring assistance should be counseled as to the identity of availability and identity of these resources.

(1) Self-referrals are defined as employees who recognize or feel that they have an alcohol problem and voluntarily request assistance. Such employees should be referred to their private physician and counseled as to the existence of the various community resources in your territory. FBIHQ should be advised of the circumstances surrounding such referrals and the employee's progress and performance should be followed.

(2) Administrative referrals – As in any situation involving a behavioral problem, deterioration in an employee's performance which is believed to be related to alcohol abuse should be reported to FBIHQ with full documentation and recommendations concerning the proposed course of action. Thereafter, UACB, the employee should be interviewed to establish the reason and/or cause of the deterioration. If the employee acknowledges that he/she has an alcohol problem, he/she should be referred for counseling and medical assistance to his/her private physician and to available community resources. The employee's progress should be followed until such time as it can be certified that his/her performance is again satisfactory.

(3) Refusal of Assistance – Should the employee refuse assistance in the face of deteriorating or unsatisfactory performance, employee should be given a firm choice between accepting assistance through counseling or professional diagnosis of his/her problem, and cooperating in the treatment prescribed, or accepting the consequences provided for unsatisfactory performance. Such consequences, depending upon the facts in a given case, could result in disability retirement or dismissal. Mindful of the FBI's unique responsibilities, it is incumbent upon the SAC or division head to recommend as to the advisability of a Government fitness-for-duty physical examination at any point.

(4) Other considerations — In view of the wide range and variety of assignments undertaken by Special Agent personnel, and the fact all are issued sidearms, SACs and division heads should consider the desirability of changing the assignment within the office of an Agent whose alcohol problem has surfaced and/or relieving the Agent of sidearm. Actions taken and recommendation for proceeding in each case should be submitted to FBIHQ.

15-3.3 Implementation of the Program

• • •

(2) This program should not be construed as a relaxation of FBI standards of conduct. FBI policy continues to require that employees should never cause themselves to be mentally or physically unfit for duty.

(3) While Public Law 91-616 and Merit Systems Protection Board decisions generally require rehabilitative efforts be made before disciplinary action for unsatisfactory job performance can be taken, they do not preclude agency action if rehabilitation fails, is refused, if job performance does not improve, or other actions or activities are present and constitute employee misconduct.

(4) No employee's job security will be threatened by a voluntary request for counseling or referral assistance.

• • •

Supreme Court, U.S.
FILED
NOV 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-433

In the Supreme Court of the United States

OCTOBER TERM, 1990

CHARLES W. BUTLER, PETITIONER

v.

RICHARD THORNBURGH,
ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Rehabilitation Act of 1973 (29 U.S.C. 791(b)) or FBI policies or procedures promulgated thereunder precluded the discharge of an alcoholic FBI Special Agent based on four alcohol-related incidents—the agent's assaults against a crippled person and a security guard, his destruction of his automobile by driving it into a wall, and his misplacing of his vehicle.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-433

CHARLES W. BUTLER, PETITIONER

v.

RICHARD THORNBURGH,
ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 900 F.2d 871 (5th Cir. 1990). The opinion of the district court (Pet. App. 1b-3b) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1990. On July 19, 1990, Justice White granted an extension of time within which to file a petition for certiorari to and including September 12, 1990. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, an alcoholic, was employed with the Federal Bureau of Investigation as a Special Agent from 1973 until his dismissal in 1987. His duties as Special Agent included conducting surveillances, undertaking investigations, testifying in federal court, making arrests, collecting evidence, conducting counter-intelligence activities, carrying and using firearms, using physical force, and driving an automobile. Pet. App. 1a.

Petitioner's alcoholism did not interfere with his job performance in his first five years as a Special Agent. In 1978, however, petitioner assaulted a crippled gas station attendant while intoxicated. A few months later, again intoxicated, he assaulted a security guard, whom he physically injured. While on probation as a result of the second incident, petitioner obtained treatment. No further incidents occurred for approximately five years when, in 1983, again under the influence of alcohol, petitioner drove his FBI vehicle into a wall, wrecking both the wall and the car. Pet. App. 22a. He was reprimanded, again placed on probation, and warned that any further incident could and would result in his discharge. Petitioner again sought treatment. Finally, in February 1987, petitioner became so drunk that he could not remember where he had left his FBI vehicle; it was not recovered for several days. Petitioner then checked himself into an in-patient alcohol rehabilitation facility. After petitioner completed the program, a facility representative notified the FBI that petitioner's "prognosis will be excellent for recovery and prolonged abstinence." *Ibid.*

In June 1987, the Bureau notified petitioner that it was considering dismissing him because of the

repeated alcohol-related incidents. Petitioner requested reconsideration based on his favorable prognosis and abstinence, but in November 1987 he was dismissed. Pet. App. 2a.

2. After exhausting his administrative remedies, petitioner filed suit in federal district court, claiming that his dismissal violated the Rehabilitation Act of 1973 (Rehabilitation Act), 29 U.S.C. 791(b), the Due Process Clause of the Fifth Amendment, and the Bureau's own regulations. The district court rejected all of these claims.[1] Pet. App. 1b-3b. It held that the policies and procedures of the Bureau's alcoholism program did not prevent his dismissal because "[t]he language used * * * regarding the implementation of the program is precatory." *Id.* at 1b (citing Manual of Administrative Operations and Procedures, Pt. I, § 15, at subpt. 3.2.1 ("employee should be given a firm choice")). On the statutory claim, the court found that there were "at least four occasions" where petitioner "engaged in serious improper conduct involving injury to both persons and property," and that petitioner's discharge "was not due to his alcoholism, but due to his recurrent misconduct." Pet. App. 2b. It concluded that the FBI had followed correct procedures in terminating petitioner. *Id.* at 3b.

3. The court of appeals affirmed.[2] Pet. App. 1a-10a. Assuming that alcoholism falls within the scope

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[1] Petitioner did not renew his Fifth Amendment claim before the court of appeals, see Pet. App. 2a, and does not raise it before this Court, see Pet. 4 n.1.

[2] Before addressing the Rehabilitation Act claim, the court of appeals first disposed of the parties' arguments under the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (the Hughes Act). The Hughes Act provides that "[n]o person may be denied

of the Rehabilitation Act, *id.* at 6a, the court noted that the protections under Section 791(b) of the Rehabilitation Act, the section which formed the basis for petitioner's claim,[3] apply only to a "qualified handicapped person." A "qualified handicapped person" is defined under the implementing regulations

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or deprived of Federal Civilian employment * * * solely on the ground of prior alcohol abuse or prior alcoholism," 42 U.S.C. 290dd-1(b), but specifically exempts the FBI from its coverage. 42 U.S.C. 290dd-1(b)(2)(A). The FBI had argued that the legislative history of the Hughes Act evidenced an intent to include current alcoholics within its scope, notwithstanding Congress's use of the word "prior" in the statute. Therefore, the Hughes Act's exclusion of the FBI from its coverage indicated that Congress intended to provide no protection to alcoholics within the Bureau.

The court agreed that the Hughes Act covered current alcoholics, Pet. App. 4a, but did not reach the second half of the FBI's argument. Instead, it noted that the Hughes Act does not apply to an employee "who cannot properly function in his employment." 42 U.S.C. 290dd-1(c). It found that the "recurring incidents that precipitated [petitioner's] termination" revealed him to have been dysfunctional when he was fired, Pet. App. 2a-3a, and that "[c]onsequently, the Hughes Act ordains no protection for the kind of problem that [petitioner] exhibited." *Id.* at 4a.

[3] Petitioner chose to sue under Section 791, rather than under the parallel provision of 29 U.S.C. 794. A suit under Section 794 would have had to overcome 29 U.S.C. 706(8)(B), which excludes from the definition of "handicapped individual" for purposes of Sections 793 and 794 one "who is an alcoholic * * * whose current use of alcohol * * * prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others." The FBI argued that this limitation should also apply to suits brought under Section 791(b), but the court did not reach this argument because it disposed of the case on other grounds. See Pet. App. 7a.

as one who, "with or without reasonable accommodation, *can perform the essential functions of the position in question without endangering the health and safety of the individual or others.*" Pet. App. 7a-8a (quoting 29 C.F.R. 1613.702(f)) (emphasis the court's); see also 29 C.F.R. 1613.703, 1613.704.

The court held that petitioner's "position as a law enforcement officer means that his alcoholic incidents furnish a sufficient basis for his discharge because he cannot carry on his work safely." Pet. App. 8a. It noted that petitioner "ha[d] not cited a single case to contradict the government's position on this," *ibid.*, distinguishing cases in which the employees' duties did not involve him in activities that "could well pose * * * a threat to the safety of others," *id.* at 8a-9a (citing *Nisperos* v. *Buck*, 720 F. Supp. 1424 (N.D. Cal. 1989) (alcoholic INS attorney may recover under the Act) (in turn distinguishing *Copeland* v. *Philadelphia Police Dep't*, 840 F.2d 1139 (3d Cir. 1988) (police officer with prior drug use may not recover under the Act), cert. denied, 490 U.S. 1004 (1989))). In summarizing its Rehabilitation Act analysis, the court stated that the Act "offers no protection to [petitioner] because he has shown himself incapable of safely performing his duties, even the simplest of which—carrying a loaded firearm—is a demanding and dangerous one." Pet. App. 9a.

The court also rejected petitioner's contention that the FBI's internal rules entitled him to a "firm choice" before being dismissed. Noting that "[t]he issue here is whether the FBI regulations are mandatory or precatory," Pet. App. 9a, the court "concur[red] fully in the [district court's] reasoning" that the FBI regulation was precatory. *Id.* at 10a. The court further noted that even if the regulations were mandatory, "they would not have afforded [pe-

titioner] a firm choice because he was not a 'self referral' and only 'self referrals' are accorded any form of job security." *Ibid.*

ARGUMENT

The regulations promulgated by the Equal Employment Opportunity Commission to implement Section 791(b) of the Rehabilitation Act—which petitioner does not challenge—protect only employees who can perform the essential functions of their position "without endangering the health and safety of [themselves] or others." 29 C.F.R. 1613.702(f).[4] Petitioner does not deny that he assaulted individuals on two separate occasions, that he wrecked his car, or that he "misplaced" his vehicle while intoxicated. Given this record of reckless conduct—including two unsuccessful attempts at abstinence after receiving treatment—the FBI and the lower courts were justified in finding that petitioner could not safely carry a firearm, drive a car, or make arrests without endangering himself or others. Given those factual conclusions, the Act did not apply. No decision of this Court, or of any court of appeals, suggests otherwise.

1. Petitioner mischaracterizes the court of appeals' decision as broadly holding that federal law enforcement officers, "almost 35,000 employees," *per se* do not enjoy any protection under the Rehabilitation Act. Pet. 6. In fact, the court of appeals concluded

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[4] Section 791(b) does not explicitly create a cause of action. In 1978, Congress amended the Rehabilitation Act to provide that suits brought under Section 791(b) should have the same "remedies, procedures, and rights" as suits under Title VII of the Civil Rights Act of 1964. See 29 U.S.C. 794a; *Prewitt* v. *United States Postal Service*, 662 F.2d 292, 301-304 (5th Cir. 1981).

only that the FBI validly dismissed this particular employee after he engaged in repeated acts of misconduct that constituted a threat to himself and others while on the job. The Rehabilitation Act affords petitioner no protection because he has shown himself unable to perform his job safely, not because he is a law enforcement officer. The court of appeals' opinion in no way speaks generally to other employees with handicaps among the ranks of federal law enforcement personnel who do not have petitioner's striking record of dangerous misconduct.[5]

2. Petitioner claims that the Fifth Circuit's result here is inconsistent with three court of appeals decisions interpreting the Rehabilitation Act, which he argues require the FBI to afford employees a "firm choice" between seeking treatment and discipline before dismissing them. See Pet. 10 (citing *Rodgers* v. *Lehman*, 869 F.2d 253 (4th Cir. 1989); *Crewe* v. *United States Office of Personnel Management*, 834 F.2d 140 (8th Cir. 1987); *Whitlock* v. *Donovan*, 790 F.2d 964 (D.C. Cir. 1986), aff'g 598 F. Supp. 126 (D.D.C. 1984)).[6] In fact, none of those cases dealt with the issue involved here—whether the employee could "perform the essential functions of the posi-

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[5] In a similar vein, petitioner contends that excluding those who are a danger to themselves and others from the Act's coverage "extends the protection of the statute only to those who do not need it." Pet. 12. This is incorrect. Most handicapped employees do not endanger the lives of others while performing their jobs, and they are protected by the Act.

[6] Although petitioner cites *Whitlock* as a court of appeals precedent, Pet. 10, the D.C. Circuit affirmed the district court without a published opinion. See 790 F.2d 964 (1986) (Table). The case therefore does not constitute precedent under that circuit's rules. See D.C. Cir. R. 8(b).

tion in question without endangering the health and safety of the individual or others." 29 C.F.R. 1613.702(f). Because the employees in the cited cases had not engaged in dangerous behavior directly related to one or more of the requirements of the job in question, the only issue was whether the employing agency had fulfilled its duty to make a reasonable accommodation to the employee's alcoholism. See *Rodgers*, 869 F.2d at 254-258 (an employee working in a civilian capacity for the Navy and another working as a boiler plant operator removed for excessive unexcused absences); *Crewe*, 834 F.2d at 141 (alcoholic applicant found unsuitable for office work); see also *Whitlock*, 598 F. Supp. at 128-129 (employee discharged from desk job because of alcohol-related absenteeism).[7]

3. Petitioner next contends that the Fifth Circuit "had no basis from which to conclude that petitioner could not perform his duties as an FBI agent." Pet. 12 (citing *School Board* v. *Arline*, 480 U.S. 273, 287 (1987)). This surprising assertion ignores petitioner's uncontested record of misconduct which formed the basis for the district court's grant of summary judgment. See Pet. App. 2b. Because petitioner does not point to any unresolved factual issue, the district court was not required to conduct a factual inquiry

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[7] The Ninth Circuit has held that there must be a "reasonable probability of substantial harm" before a handicapped applicant can be denied employment in higher-risk jobs. *Mantolete* v. *Bolger*, 767 F.2d 1416, 1422 (1985). The plaintiff in *Mantolete* argued that there was insufficient reason to believe her handicap would result in injury to herself or others because, among other reasons, she had performed a similar job flawlessly for years. 767 F.2d at 1419. Here, petitioner has already shown the danger that the combination of his handicap and job responsibilities poses to others.

before concluding that "[petitioner] engaged in serious improper conduct involving injury to both persons and property," *ibid.*, and therefore that the FBI could reasonably conclude he could not safely discharge his duties as a Special Agent.

4. Finally, nothing warants this Court's review of the court of appeals' finding that the FBI's internal manual was only precatory. The only other court of appeals to address the issue has concluded that a similarly worded manual written by the Office of Personnel Management to implement Section 504 of the Rehabilitation Act (29 U.S.C. 794) is only precatory. See *Judd* v. *Billington*, 863 F.2d 103, 105-106 (D.C. Cir. 1988); cf. *Rodgers* v. *Lehman*, 869 F.2d 253, 258-259 (4th Cir. 1989).

Petitioner also stated that "there is no basis upon which to deny [the FBI Manual's] enforcement" because it "does no more than restate the Rehabilitation Act as it applies to every other executive branch employee." Pet. 14. On petitioner's own characterization, the Manual offers no more protection than that provided under the Rehabilitation Act. For the reasons already stated, that Act affords petitioner no protection in this case. See pp. 6-8, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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